

United States Department of the Interior

FISH AND WILDLIFE SERVICE

5600 American Boulevard West, Suite 990
Bloomington, Minnesota 55437-1458



IN REPLY REFER TO:

FWS/AES-HC

APR 25 2016

Colonel Christopher G. Beck
District Engineer
U.S. Army Corps of Engineers
Louisville District
P.O. Box 59
Louisville, Kentucky 40201-0059

Dear Colonel Beck:

This letter provides an additional response of the U.S. Fish and Wildlife Service (Service) to Joint Public Notice LRL-2013-635-GJD, dated March 23, 2016. The permit applicant, United Minerals Company, LLC (UMI), proposes to extract subsurface coal material, to construct levees, sediment basins and haulage roads, to conduct floodway excavation, and to construct a bridge crossing and conveyor crossing over Pigeon Creek. The proposed permit area covers 1,679.6 acres and contains a combination of undisturbed bottomland along Pigeon Creek, including approximately 7,876 feet of the Pigeon Creek channel, and previously mined land in the North Millersburg, South Millersburg and Ayrshire Mines. Total impacts from the proposed project include 510.16 acres of wetlands (462.18 acres forested, 27.13 acres emergent, 19.81 acres scrub-shrub, 1.04 acres unconsolidated bottom), 53,840 linear feet of streams (200 linear feet perennial, 8,427 linear feet ephemeral, and 45,213 linear feet intermittent), and 72.85 acres open water. The Service, along with the U.S. Environmental Protection Agency (EPA) provided detailed comments under the Public Notice in a joint letter dated March 17, 2016.

We are providing this letter to reserve the option to elevate this individual permit action if significant differences remain between our agencies over the disposition of this permit, in accordance with the Memorandum of Agreement (MOA) between the Department of the Interior and the Department of the Army on Section 404(q) of the Clean Water Act, dated December 21, 1992. Pursuant to Part IV, Paragraph 3(b) of the MOA, it is the opinion of the Department of the Interior that the project *will* result in substantial and unacceptable impacts to aquatic resources of national importance.

The Service's comment letter of March 23, 2016 and the Service's and EPA's joint comment letter of March 17, 2016, clarifies: (1) why, in this case, it is the opinion of the Service, acting on behalf of the Department of the Interior, there will be substantial and unacceptable impacts to

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aquatic resources of national importance; (2) why the subject permit must be denied in order to protect these resources; and (3) how our determination was made.

The Supervisor and staff of the Bloomington, Indiana, Ecological Services Field Office will continue to be available for coordination to resolve differences between our agencies that may arise on this pending permit action. If resolution of any remaining differences cannot be achieved and your proposed permit decision may be contrary to our recommendation or a mutually agreeable alternative, we request that the Field Office and Regional Director be provided the proposed draft permit, special conditions, and decision document at least 10 days prior to a Part IV, Paragraph 3(c) "Notice of Intent" letter (see Item 5 of the Interagency Questions and Answers Concerning the 1992 MOA, dated June 1993).

In summary, the Service recommends that issuance of the requested permit be denied because the Service considers the Ohio River, Pigeon Creek, and the Pigeon Creek floodplain to constitute productive and valuable public resources which serve significant natural biological functions, including flood control, water quality, food chain production, general habitat, and nesting, spawning, rearing and resting habitat for aquatic and land species. As defined by the Section 404(b)(1) Guidelines, we consider the site to be a Special Aquatic Site that possesses special ecological characteristics of productivity, habitat, wildlife protection and other important and easily disrupted ecological values.

The affected wetlands and other bottomland forest provide essential habitat for state endangered and federally listed species including Indiana bats (*Myotis sodalis*), northern long-eared bats (*Myotis septentrionalis*), evening bats (*Nycticeius humeralis*), cerulean warblers (*Setophaga cerulean*), northern harriers (*Circus cyaneus*), and copperbelly water snakes (*Nerodia erythrogaster neglecta*). All of these species and several state species of special concern have been documented within the permit area.

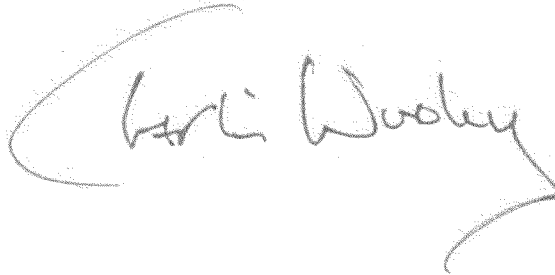
Indiana has lost eighty-five percent of its wetlands, and large remaining tracts such as those present in the permit area are rare. In particular, forested wetlands are a declining resource. According to the National Wetland Reports, forested wetlands experience the greatest decline of all wetlands types. UMI asserts that the additional range of habitat types that would result from reclamation activities at the Seven Hills Mine site will be an improvement over existing conditions. However, given the high acreage of forested wetlands that would be lost, the time it takes for forests to mature, and the poor performance of mitigation on the nearby Somerville and North Millersburg mines, it is highly unlikely that the reclaimed areas will develop habitat that is more productive than what currently exists.

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We look forward to working with you to develop acceptable modifications to the proposed project. For continued field-level coordination, please contact Ms. Marissa Reed at (812) 334-4261 or marissa_reed@fws.gov or Mr. Scott Pruitt, Supervisor, Bloomington, Indiana, Field Office, 620 South Walker Street, Bloomington, Indiana 47403; telephone: (812) 334-4261, ext. 214; fax: (812) 334-4273.

Sincerely,

A handwritten signature in dark ink, appearing to read "Carl Woolley". The signature is written in a cursive style with a large, sweeping initial "C" and a long, trailing flourish at the end.

Enclosures

cc: LeAnne Devine, USACE-Louisville District
George DeLancey, USACE-Louisville District
Bob Krska, USFWS-Regional Office, Bloomington, MN
Jason Miller, USFWS-Headquarters, Falls Church, VA
Andrea Schaller, USEPA Region V, Chicago, IL